National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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L.C. Smith Lumber Company, Cases 7-CA-27643 and 7-CA-27689

530-6050-0120, 530-6050-1612-5000, 530-6067-2060-7700, 530-6067-2080-6200, 530-6067-4033-6700

These Section 8(a)(5) cases were submitted for advice as to whether L.C. Smith Lumber Company (the Employer) violated the Act by insisting to impasse on, and implementing, contract clauses granting it an unlimited right to subcontract unit work, and the right to make final and non-grievable decisions regarding which employees will receive merit increases and the amount of such increases.

FACTS

(1) On May 19, the parties began negotiations for a new contract. Thereafter, they held 13 bargaining sessions, ending on August 21, when the Union rejected the Employer's last offer. On August 24, the Employer implemented its last offer.(2)

By letter dated September 17, the Employer's attorney requested that the Union resume contract negotiations, and proposed further wage cuts and that the Employer be granted the unlimited right to subcontract bargaining unit work. The parties then met 12 times between September 25, 1987 and January 7, 1988. The Employer initially raised the subject of merit wage increases at the October 10 bargaining session. On October 14, the Employer submitted its proposal regarding merit wages to the Union. After substantial discussion of that Employer proposal,(3) the Employer submitted a revised proposal to the Union on November 9. The revised merit wage increase proposal provided as follows:

The Employer shall be allowed to provide merit increases to individual employees during the term of this agreement provided that the employee's hourly rate of pay remains equal to or greater than the minimum established in this agreement. Each employee will be reviewed in January and June of every year to determine whether a merit increase or withdrawal of such is warranted. The granting or withdrawal of a merit increase will be allowed only twice each year, following the January and June review. Employees who receive merit increases shall be placed at either Level 1 at thirty (.30) cents more than base wage rate, Level 2 at sixty (.60) cents more than base wage rate, Level 3 at ninety (.90) cents more than base wage rate, or Level 4 at one and 20/100 ($ 1.20) dollars more than base wage rate. Factors to consider in the granting or withdrawal of merit increases shall include an employee's productivity, attitude, attendance and tardiness, experience, ability and general work record. Degree of Union activity shall not be considered a proper factor for consideration. A committee of three (3) will be created, to be composed of one (1) employee from the driver/warehousemen [sic] classification and one (1) employee from the yardman classification, who will be elected by Union members for terms of one (1) calendar year, along with a third (3rd) member to be a supervisor chosen by the Employer. The committee will meet semiannually in conjunction with the merit increase review process and will make recommendations to the Employer concerning individual employee merit increases or withdrawals of merit increases. The committee shall have access to the employees' personnel file including all disciplinary reports and the Employer shall not make its final determination based on any matter which the committee was not previously advised of. It is understood that the committee will have the ability to make recommendations, but that the final determination on merit increases and withdrawals shall be with the Employer and such Employer determinations shall not be subject to the grievance and arbitration process.

When the Union did not present any new counterproposals on January 7, 1988, the Employer asserted that the parties had reached an impasse in bargaining. On January 18, 1988, the Employer implemented its "last offer" regarding merit wage

increases and subcontracting.

Meanwhile, on January 14, 1988, the Union filed the Section 8(a)(5) charge in Case 7-CA-27643, alleging that the Employer had bargained in bad faith by, among other things, insisting on a contract clause granting the Employer an unlimited right to subcontract unit work, proposing "unneeded changes" in working conditions although the Employer knew the Union could not agree to such proposed changes, and bargaining with the intention of creating an impasse rather than with the intention of reaching an agreement.(4) On January 27, 1988, the Union filed the Section 8(a)(5) charge in Case 7-CA-27689, alleging that the Employer had unlawfully implemented changes in unit employees' established working conditions before a valid bargaining impasse had been reached.

ACTION

We concluded that a Section 8(a)(5) complaint should issue, absent settlement, alleging that the Employer unlawfully insisted upon, and implemented, its unlimited subcontracting and merit wage increase contract proposals.

In Reichhold II,(5) the Board held that it would "continue to examine [a party's bargaining] proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract." Id., sl. op. at 3. The position taken by the Board in Reichhold II reflects its position in earlier cases. (6) Thus, in evaluating a Section 8(a)(5) case, it is permissible to consider the substantive content of bargaining proposals.

The position taken by the General Counsel in Colorado-Ute Assn., Inc., Cases 27-CA-8959, et al., and Toledo Blade Co., Case 8-CA-16067, now pending before the Board, is also consistent with Reichhold II. In Colorado-Ute, the employer's proposal would permit it unilaterally to determine merit wage increases, and any protests concerning merit pay would be discussed directly by the employer with employees. Further, the union could not grieve the merit pay increases. In Toledo Blade, the employer's proposal would grant it the sole right to offer retirement and separation incentives to individual employees and would require that the union waive the right to arbitrate such matters. In those two cases, the General Counsel argued that the employer proposals at issue were permissive subjects of bargaining that could not be insisted upon to impasse, because they deprived a union of its statutory right to represent employees and to bargain on their behalf. Alternatively, the General Counsel argued in those cases that, even if the proposals were mandatory subjects and the employers could insist to impasse upon their inclusion in a contract, the employers still could not unilaterally implement them after impasse without the clear and unmistakable consent of the union.

Applying the above principles to the facts here, we concluded that the Employer unlawfully insisted upon the subcontracting and merit increase proposals. Further, in the absence of the Union's consent, the Employer was not privileged to implement these proposals unilaterally.

With regard to the Employer's unlimited subcontracting proposal, we noted that it is designed to give the Employer the right to unilaterally subcontract all unit work. Since such a decision would not be subject to grievance-arbitration, and in view of the apparently broad no-strike clause, the Union would be without recourse to protest such a decision. In these circumstances, where the proposal gives the Employer the unilateral and unfettered power to abolish the unit, we would argue that the Employer is not privileged to insist to impasse on such a clause. In addition, where, as here, a subcontracting proposal seeks to impose on the union a waiver and the union does not agree to waive its statutory bargaining rights on this subject, we believe that an employer is not privileged to implement the proposal unilaterally. In essence, an employer cannot unilaterally impose a waiver on the union. In our view, such employer conduct constitutes an anticipatory repudiation of an employer's statutory duty to bargain about subcontracting in the future.(7) Further, it is clear that the proposal at issue here, which would allow the Employer unfettered discretion to subcontract bargaining unit work, could decimate the unit, thereby eroding, if not eliminating, the Union's majority support. See, e.g., A-1, supra, 265 NLRB at 859-861. Thus, even if the Employer were privileged to insist to impasse upon the unlimited subcontracting clause, the Employer was not privileged to implement this clause over the Union's objection.

With regard to the Employer's merit wage increase proposal, we concluded that the rationale of Colorado-Ute, supra, is controlling.(8) Thus, since this proposal was permissive, the Employer violated Section 8(a)(5) by insisting on it to impasse.

Moreover, even assuming that the Employer's merit wage increase proposal is a mandatory subject of bargaining, (9) and that the Employer could insist to impasse upon that proposal, the Employer nevertheless could not thereafter lawfully implement its proposal unilaterally absent a Union waiver or consent. Again, the Employer cannot unilaterally impose a waiver on the Union. Here, it is clear that the Union did not consent to, or waive its right to bargain about, merit wage increases. Thus, the Employer's unilateral implementation of its proposal effectively deprived the Union of its statutory right of representation of unit employees with regard to the vital subject of compensation.

This case is distinguishable from Phil Rich, supra, where the Board dismissed a Section 8(a)(5) complaint alleging, among other things, that an employer had bargained in bad faith by insisting upon its merit wage increase proposal. In that case, the Administrative Law Judge, with Board approval, concluded that the union had expressed an "ambivalent position" regarding the employer's proposal, since the union's primary quarrel with the employer pertained to the size of the proposed merit wage increase, and not to the concept of unilaterally determined merit pay. 171 NLRB at 594. Additionally, the ALJ noted that the employer's overall bargaining posture indicated a willingness to meet and discuss its proposals with the union and to reach an agreement. Id. at 591, 594.

Zlogar, supra, is also distinguishable from this case. In Zlogar, the ALJ found that the employer's merit wage increase proposal was not evidence of bad faith bargaining. The employer's proposal limited the employer's ability to grant wage increases within a defined range and, thus, was not facially unreasonable. Moreover, wage increase disputes were grievable. 278 NLRB at 1092-1093.

In contrast, the Union here has vigorously contested the Employer's proposals on subcontracting unit work and granting merit wage increases to employees. While the Employer has made some concessions with regard to the latter subject, those concessions are not responsive to the Union's concern that the Employer retains the right to make final, non-grievable, and non-arbitrable decisions regarding which employees will receive merit increases and the amounts of such increases.

Finally, with regard to the Employer's subcontracting proposal, we recognize that the Union may have agreed to a similar clause in its contract with another employer. However, quite apart from the fact that the Union was bargaining for an initial contract with that other employer, it is clear that the Union's behavior in another bargaining situation does not warrant a different conclusion in the instant bargaining situation. See, e.g., Moore of Bedford, supra, 187 NLRB at 722.

Hence, absent settlement, complaint should issue consistent with the above analysis.

H. J. D.

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[1] All dates are in 1987, unless otherwise indicated.

[2] The "last offer" which the Employer implemented on August 24 contained wage cuts and the following limits on subcontracting:

The Employer may subcontract work when all of his regular employees are working, provided that this right shall not be used as a subterfuge to violate the provisions of this Agreement. Such subcontracting shall not serve to displace or replace any bargaining unit position.

[3] Essentially, the Union wanted a joint labor-management committee to have more decision-making authority in determining the standards for awarding merit increases, in setting the amounts to be received by employees, and in resolving disputes regarding merit increases. While the Employer said it did not oppose the formation of a joint committee to make recommendations regarding merit wage increases for employees, the Employer was adamant in insisting that it have the final decision-making authority in this area.

[4] The only issues submitted for advice pertain to whether the Employer was privileged to insist to impasse on, or to implement unilaterally, its unlimited subcontracting and merit wage increase proposals.

[5] 288 NLRB No. 8 (March 17, 1988).

[6] See, e.g., A-1 King Size Sandwiches, Inc., 265 NLRB 850 (1982), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984). In A-1, cited with approval in Reichhold II, 288 NLRB No. 8, sl. op. at 5 fn. 13, and sl. op. at 7-8, the surface bargaining allegation was based primarily upon the substance of the respondent employer's bargaining proposals. Those proposals would have entitled the employer there to retain total control over, and to make unilateral decisions regarding, virtually all significant aspects of the employer-employee relationship without allowing the union or unit employees recourse to a grievance-arbitration procedure.

[7] See, e.g., Collateral Control Corp., 288 NLRB No. 41 (March 31, 1988), as to the mandatory nature of subcontracting decisions.

[8] See the General Counsel's statement of position in that case.

[9] See, e.g., Walter A. Zlogar, Inc., 278 NLRB 1089 (1986); Moore of Bedford, Inc., 187 NLRB 721 (1971), enf. denied 451 F.2d 406 (4th Cir. 1971); Phil Rich Fan Mfg. Co., Inc., 171 NLRB 586 (1968).